IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428.

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,
Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,
Respondents.

No. 429.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

vs.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,
Respondents.

REPLY ON BEHALF OF PETITIONERS

WILLIAM J. GROVE,
Assistant Counsel,

THOMAS M. KERRIGAN,
Assistant Counsel,

LLOYD S. BENJAMIN,
Acting Counsel,

For Pennsylvania Public Utility Commission,
North Office Building,
Harrisburg, Pennsylvania.

WILKIE BUSHBY,
Messrs. ROOT, BALLANTINE, HARLAN, BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.

RANDALL J. LEBOEUF, JR.,
Messrs. LEBOEUF & LAMB,
15 Broad Street,
New York 5, N. Y.

JAMES PIPER,
Messrs. PIPER & MARBURY,
1000 Maryland Trust Building,
Baltimore 2, Md.

RAYMOND SPARKS,
Messrs. AWALT, CLARK & SPARKS,
822 Connecticut Avenue,
Washington 6, D. C.

Attorneys for Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland.

INDEX.

Table of Citations.

Cases.

Statutes.

REPLY ON BEHALF OF PETITIONERS.

The clear conflict between the Fourth and D. C. Circuits, on the question of the FPC's authority to validate contractual arrangements violative of the anti-trust laws and state law, places Penn Water in the position of having been told by the Fourth Circuit that its contractual arrangements violate criminal law and by the D. C. Circuit that those same arrangements are legally required. Unless the conflict is resolved by this Court, this dilemma can confront not only Penn Water but every utility which is subject to Federal Power Commission regulation, as well as companies subject to the jurisdiction of other Federal regulatory agencies.

Government counsel in their "Memorandum for the Federal Power Commission" (Gov. Mem.) do not oppose the granting of a writ of certiorari in respect of the principal question (set out in Penn Water's Questions I and II) presented by Petitioners, saying only that "this Court may not deem this an appropriate case in which to consider that question" (Gov. Mem., p. 32). They admit the direct conflict between the opinions of the D. C. majority and the Fourth Circuit and concede the importance of the question (Gov. Mem., p. 21). They do not attempt to support the opinion of the D. C. majority that the FPC has authority to validate arrangements violative of the anti-trust laws and state law.*

Instead, government counsel, as do the Intervenor-Respondents (Consolidated and the Maryland Commission), in order to avoid an outright confession of error on the part of the FPC and the D. C. majority, have invented a specious and attenuated argument that the conflicting hold-

* To have supported the D. C. majority on this point would be in direct conflict with the traditional position taken by the government (as illustrated in a case now pending in this Court, *Far Eastern Conference et al.* v. *U. S.*, October Term 1951, No. 15 Misc.) to the effect that an administrative body has authority to grant exemption from the antitrust laws only to the extent expressly empowered to do so in its organic act, and that federal regulatory statutes do not impliedly exclude activities subject to their provisions from the antitrust laws. (Government brief in opposition to certiorari in that case, p. 5.)

ings on the authority of the FPC to exempt from the anti-trust laws and state laws were not necessary to the decision below or to the Fourth Circuit decisions and were therefore *dicta*. Such contentions are refuted by the whole course of the proceedings below and in the Fourth Circuit, by the arguments and briefs of counsel and by the opinions of the Courts.

Respondents Consolidated and Maryland Commission also assert that this case presents a collateral attack on rate orders of the FPC and that Penn Water* should start another rate proceeding before the FPC in order to present the issues already raised in this case. On the contrary, this case represents a direct appeal from FPC rate orders which have not yet gone into effect. This Court should determine whether the rate orders shall stand or shall be reversed or modified, particularly because the rate orders disregard the illegality of the contractual arrangements on which they are based.

These evasive attempts to prevent this Court from resolving the admitted conflict between Circuits is in furtherance of the program by which Consolidated has sought to keep the relatively smaller Penn Water a captive and prevent competition from it by maintaining control over the latter's expansion and sales of power to others, while at the same time compelling purchases of power from Consolidated on its own terms, all of which the Fourth Circuit held illegal.

The 97 pages of briefs filed by the Respondents are largely devoted to discussion of matters other than the central points.** These irrelevancies are devoted principally to making this Court think that to upset or modify the FPC rate order would impair Penn Water's generation, transmission and delivery of electricity to its present customers. But it is plain that what is involved in this case is

---

* References to Penn Water in this brief will include Susquehanna unless otherwise stated.

** In these briefs Respondents call attention to the size of the printed record technically before this Court at their insistence. Substantially all of it is wholly irrelevant to the points at issue on the petition, as Penn Water pointed out in its petition, fn., p. 2.

only the contractual structure and the question whether Consolidated shall continue to dominate Petitioners under an arrangement which, as asserted in the FPC brief below (Tr. 5574), was prescribed by the FPC and "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's facilities," a situation which the Fourth Circuit condemned.

The Respondents no more than mention and do not discuss the point (also ignored by the D. C. Circuit) that the contractual arrangements have been held by the Courts in the Fourth Circuit to violate the laws of Penn Water's and Safe Harbor's state of incorporation, Pennsylvania, destroy their corporate virility and are *ultra vires;* nor do they point to any provision of the Federal Power Act even purporting to authorize the FPC to override such laws. This is not a mere matter of conflict between Federal and State rate regulation. (See Penn Water's petition, pp. 30-32.)

The Respondents have wholly failed to refute the point made in the petition of the Pennsylvania Public Utility Commission (No. 429, pp. 21-25) that the D. C. majority's decision is contrary to the decisions of this Court in *Peoples Gas Co.* v. *Public Service Commission,* 270 U. S. 550 (1926) and *Lone Star Gas Company* v. *Texas,* 304 U. S. 224 (1938). Those cases clearly establish that the energy produced and sold in Pennsylvania is in intrastate commerce regardless of whether mingled with energy from another state. The respondents do not dispute the Pennsylvania Commission's statement as to the principle established by these cases but merely contain vague statements to the effect that they are distinguishable because of what the FPC calls the "unique characteristics" of the Penn Water operations.

As to the question of applicability of Part II to a licensee under Part I, the Respondents ignore the fact that this point is basic to the holding of the D. C. majority that Part II repealed by implication Section 10(h)* of Part I.

---

* This section expressly reaffirms the applicability of the antitrust laws to Part I licensees.

This holding raises the same question as the D. C. majority's holding that Part II repealed by implication other provisions of the antitrust laws. Both these holdings were basic to the asserted authority of the FPC to absolve contractual arrangements from the Federal antitrust laws, and clearly both holdings should be reviewed if certiorari is granted.

(1) The point of law on which the D. C. majority and the Fourth Circuit admittedly conflict was the basis of the decision below. The issue as to the authority of the FPC to compel, and base its rate orders upon, continued performance by an electric utility of arrangements which have been adjudged to violate the antitrust laws, public policy and state laws, was a focal point of the decision below, and was the point upon which the D. C. majority and minority split.

No one can read the majority opinion below without seeing that the majority realized that, so far as concerns the antitrust laws and state law, it could not uphold the FPC rate orders based on the patently illegal foundation contracts without first holding that the FPC had authority under the Federal Power Act to absolve such contracts from the operation of such laws. This is proved by the fact that the D. C. majority opinion sustains various features of the rate orders by reference to the *"obligations and entitlements"* contained in, and only in, the fonndation contracts, after having devoted five pages to upholding the authority of the FPC to absolve the contracts from their illegality. Moreover, this was expressly recognized by Bazelon, J., in the opinion below, when he stated that to uphold Pennwater's position "would be to substitute antitrust criteria for those of the Federal Power Act" (R., Vol. 18, p. 55).

The other member of the D. C. majority (Fahy, J.) expressed himself to the same effect when, in a subsequent decision, he said:

> "In our recent decision in *Pennsylvania Water & Power Company, et al.* v. *Federal Power Commission*, U. S. App. D. C. F. 2(d) ; decided July 3, 1951; we dealt with the power of the Commission,

> acting within the policy and provisions of the Federal Power Act, to require the continuance of arrangements which, without the sanction of valid public authority, would violate the antitrust laws." *Maryland and Virginia Milk Products Association* v. *U. S.*, F. 2d (D. C. Cir., Nov. 8, 1951).

The dissenting Judge in the D. C. Circuit characterized "the basic issue", as follows (R., Vol. 18, pp. 82-83):

> "Has the Federal Power Commission authority to order a combination of these two utilities under terms and conditions which, if arranged by private contract between them, would clearly violate the Federal antitrust laws and the Public Utility laws of Pennsylvania?"

He then devoted the whole of his 18-page opinion to a discussion of the point.

The FPC and the other respondents have elsewhere repeatedly conceded and asserted that the decision of the D. C. majority herein is a holding that the FPC has authority to absolve these contractural arrangements from the impact of the antitrust laws and state law.

The FPC, in its brief (pp. 36, 43, 44, 45, 47) in the recent case before the Fourth Circuit regarding the Safe Harbor contract, cites the majority decision at least six times to that effect in urging the Fourth Circuit for that reason to hold the Safe Harbor contract valid in its entirety.

In the same case in the Fourth Circuit, Consolidated in its brief (pp. 65, 66, 80) and the Maryland Commission in its brief (pp. 9, 14) cited the D. C. majority opinion herein in a similar manner and for a similar purpose.

Furthermore, in the Court below in this case the FPC's brief, contrary to its present assertion that it has not entered any order prescribing or premised upon the arrangements adjudged unlawful, stated that the rate schedule which it prescribed for Penn Water "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's facilities" (Tr., p. 5574).

In view of these representations made by respondents to other Courts, it is difficult to see how they can make the contrary argument to this Court that the majority decision below does not constitute a holding that the FPC has authority to exempt contractual arrangements otherwise illegal from the antitrust laws and state law.

(2) The point of law on which the D. C. majority and the Fourth Circuit admittedly conflict was also a basis of decision in the Fourth Circuit. In the Baltimore contract case the Fourth Circuit decided (a) that the contract was illegal under the antitrust laws, state law and public policy and (b) that prior approval by the Federal Power Commission of such contract would not absolve it from such illegalities. The second point as well as the first was necessary to the decision of the Fourth Circuit, because Consolidated and the Maryland Commission had argued at length in their briefs (Consol. Br., pp. 25-54; Md. Comm. Br., pp. 6-11)* that the contract had been approved by the Federal Power Commission and was therefore exempt from the operation of the antitrust laws and state law and that the Court had no jurisdiction to invalidate the contract on the basis of such laws. This point was then necessarily dealt with at length in Penn Water's reply brief in that case (pp. 15-24).

The claim of the authority of the Federal Power Commission to absolve the contract was one of the principal points in the petitions of Consolidated and the Maryland Commission in this Court for a writ of certiorari to the Fourth Circuit in the Baltimore contract case. This Court denied certiorari, 340 U. S. 906 (1950).

Similarly, the same question of the authority of the FPC was presented in the subsequent case in the Fourth Circuit involving the Safe Harbor contract, and the Fourth Circuit followed its decision on this point in the prior

* How then can Consolidated say in its brief in this Court (p. 7) that the point was not passed upon by the Fourth Circuit in that case?

case* citing its prior opinion, quoting with approval the dissenting opinion in the D. C. Circuit herein and stating expressly that it disagreed with the holding of the D. C. majority on the point (Pamphlet Op., pp. 18-19).**

As already indicated, all the Respondents herein argued the point in the Fourth Circuit in briefs and orally. There is nothing to the claim that the FPC was not a party to these cases in the Fourth Circuit, for as stated by the Fourth Circuit (Pamphlet Op., p. 3) FPC counsel were present in all courts in both cases and were given full opportunity to brief the point and argue it orally. The FPC brief consisted of 52 pages.

In its recent decision the Fourth Circuit reiterates the statement in its previous opinion that the FPC should approve some different contractual arrangement for the sale of power between these utilities which "will not offend either the antitrust laws or the utility laws of Pennsylvania".

There could not be a more direct conflict between two courts, not merely on the principle of law involved but on the application of that principle to the same subject matter.

(3) It is clear from the FPC orders themselves that a holding that the FPC had authority to absolve the contracts from the antitrust laws and state law was necessary if such orders were to be sustained. The FPC opinions and orders themselves also show that they are without basis unless the contractual arrangements are valid and continuing by reason of the FPC approval. Nevertheless, the Respondents now contend that the rate orders are based on physical operations as they were found to be conducted without regard to any contractual arrangements between the

---

* *Consolidated Gas Electric Light and Power Company et al.* v. *Pennsylvania Water & Power Company et al.*, Fourth Cir., January 3, 1952, a copy of which opinion was filed with this court in pamphlet form (Pamphlet, Op.).

** In this decision the Fourth Circuit expressly confirmed Penn Water's position regarding the conflict stating (Pamphlet Op., p. 18) "We are constrained to differ from this conclusion [of the D. C. Circuit] for the reasons set out in our opinion in Penn Water v. Consolidated, 184 F. 2d, 552, * * *."

parties, and that the FPC neither contemplated nor ordered continuance of the arrangements.

Penn Water has already shown in its Petition (pp. 8-15) (and Respondents' argument nowhere answers) (a) how the critical features of the FPC rate orders rest on the assumed continued existence of the illegal "foundation contracts," (b) how Penn Water was required to purchase power from Consolidated at Consolidated's behest under a contractual clause held to be in direct violation of Section 3 of the Clayton Act, (c) how a provision of the contract which was held *per se* violative of the Sherman Act made installation of additional facilities by Penn Water subject to approval by Consolidated, (d) how the FPC ordered the contractual method of payment continued notwithstanding that it is a pooling of revenues clearly illegal under the Sherman Act,* (e) how the low rate of return allowed by the FPC was based solely on the continuing contractual obligation of Consolidated until 1980 to take electric service, and pay therefor a fixed rate of return, regardless of the amount of power furnished,** (f) how the FPC's deci-

---

* Respondents claim that the Fourth Circuit did not hold the revenue pooling arrangement illegal, notwithstanding that the revenue arrangement is basic to the Baltimore and Safe Harbor contracts, and that such contracts were held illegal in their entirety by the Fourth Circuit. In its first opinion in the *Penn Water* case, the Fourth Circuit, having found some illegal features of the contract, expressly refrained from going on and passing on other features. But in the *Safe Harbor* case, contrary to the assertion of government counsel (fn. p. 23) and Consolidated (Br., p. 23), the Fourth Circuit expressly enumerates (Pamphlet Op., pp. 6-7) the revenue provision among the illegal provisions. Furthermore, the provision for payment of operating expenses and a fixed return, regardless of services rendered, with a credit for any revenue received from others, clearly stifles initiative to get business and to compete, and to effect operating economies, and is illegal under the established decisions of this Court discussed in Penn Water's Petition (pp. 25-28). The Respondents have not attempted to distinguish those cases or to cite any contrary authority.

** The government Memorandum in this Court concedes (p. 16) that the sole basis of the rate of return is that "Penn Water was assured a stabilized income as in the past," "under the arrangements with Consolidated which the FPC directed be continued". The claim of Consolidated (Br., p. 24) that the FPC asserted that the rate of return was "independently bottomed" is simply not correct. The reference is not to any order of the FPC but simply to *ex post facto* statements of counsel.

sion that the sale by Penn Water in Pennsylvania of power generated in Pennsylvania to Pennsylvania utilities comes under the jurisdiction of the FPC was based solely on the contractual arrangements including the contractual compulsion, violative of Section 3 of the Clayton Act, that Penn Water purchase power generated by Consolidated in Maryland, and (g) how the allocation of the rate reduction primarily to Consolidated was based solely on the contractual "entitlements" of Consolidated and not on actual operations. The entitlements used by the FPC as a basis for its allocation of the rate reduction were the entitlements to the amount of power provided in the contract, not the amounts of power actually delivered, which were far less. Obviously, a tariff, as differentiated from a contract, could not properly provide for such artificial entitlements, and the statement of Consolidated (Br. p. 25) that the entitlements are those provided for by a tariff is simply unfounded.*

Government counsel in their Memorandum in effect admit that the orders are based on the assumed continuance of the illegal control provisions of the contracts, stating (p. 27) that the output of the "integrated and coordinated interstate electric system" upon the existence of which the orders are assertedly based "is peculiarly the interstate product of the integrated system, *functioning as a single multi-state, electric and economic unit*" (italics added). The operation of the three companies in this manner could only be achieved by the contractual arrangements condemned by the Fourth Circuit.

In its brief in the recent Fourth Circuit case (p. 19) the FPC (as well as the other two Respondents) expressly

---

* The government Memorandum also concedes (p. 25) that the finding of the FPC that the Pennsylvania business was interstate and its finding regarding allocation of the rate reduction "were based on the continuance of the arrangements as to power pooling and the residual-payment type of rate." The claim of Consolidated (Br., pp. 24-25) that the FPC has asserted that the Commission's jurisdictional findings were based on actual operations, and not upon the existence of any assumed contractual obligation, is also entirely incorrect. There is no such statement by the FPC but only *ex post facto* statements of counsel.

stated that it had approved and prescribed *all* the provisions of the Safe Harbor contract, "including the terms which the District Court viewed as in restraint of trade," and urged upon the Fourth Circuit that, for that reason, the Fourth Circuit should hold *all* the provisions of that contract exempt from the operation of the anti-trust laws and state law and therefore valid. Yet here the FPC (like the other Respondents) takes the position before this Court that the FPC has not approved or prescribed any of the illegal contractual provisions upon which its rate orders depend.

Respondent Consolidated's assertion in its brief in this Court (pp. 7-8) that the FPC's orders related only to "service" provisions of the contracts and do not include the illegal restrictive provisions, is directly contrary to the representations made by Consolidated to the Fourth Circuit in the Baltimore contract case and to this Court in its petition for certiorari in the Baltimore contract case. In its brief to the Fourth Circuit (pp. 35, 39) Consolidated stated that "all of the terms" of the contract were directly involved and that all the provisions were "terms of sale" and "inextricably interdependent," and constituted the tariff on file. Similarly in its petition to this Court for certiorari (p. 20) it stated that "the Commission necessarily approved every provision of the Basic Agreement except the pecuniary amount of the rates."*

Regarding the contention of Government counsel that by the phrase "in and of themselves lawful" in its order of October 27, 1949, the FPC intended to exclude from the continuing arrangement provisions which might be held

---

* The Respondents nowhere explain how there is any business reality under their present theory of the situation created by the FPC orders and the Fourth Circuit decisions. The Penn Water contract, absent Articles IV and V, is not a rational business arrangement, as asserted by Consolidated itself in affidavits and briefs submitted to the Fourth Circuit and in its brief to this Court (p. 18). Counsel for the government here concede (Govt. Mem., p. 23) that the entire agreement was stricken down because its illegal provisions were inseparable parts of a contract that could not operate as a contract between the parties without these provisions. How could the arrangement operate any better as a rate schedule between the parties in the absence of these provisions?

to be illegal, we refer the Court to Penn Water's petition (pp. 11-12) and to the fact that it seems disingenuous to contend that an administrative body like the FPC was directing continuance of an arrangement indefinite in scope and dependent on subsequent decisions which might be rendered by courts in other cases, either the Penn Water contract case or the Safe Harbor contract case or some other case, none of which had then been decided.

(4) The FPC Orders Authorize Private Parties to Violate the Antitrust Laws. The D. C. majority cited *Parker* v. *Brown*, 317 U. S. 341 (1943), as indicating that a state or governmental body might commit acts which would be in violation of the antitrust laws if committed by private parties and there is an obscure reference to the case in the government Memorandum here (p. 21).

However, the case has no application to the present situation, as the Fourth Circuit directly held (Pamphlet Op., p. 20) and as Penn Water pointed out in its petition (pp. 23 and 24). In *Parker* v. *Brown* the State of California fixed production quotas for producers of raisins. It was held that this was the act of the State and that the acts of a State were not within the purview of the federal antitrust laws. However, this Court pointed out that it would have decided otherwise if the State had purported to authorize private individuals to violate the antitrust laws, i.e., to fix quotas for themselves and other producers.

The latter is the situation here. The FPC orders authorize a private party (Consolidated) to violate the antitrust laws.

As the Fourth Circuit pointed out (R. Vol. XVIII, pp. 8-9) Consolidated has consistently exercised its powers in disregard of the interests of both Penn Water and the public. The FPC had no authority to prevent or to supervise such actions by Consolidated and has never attempted to assert any such authority.*

---

* Even if such authority existed in the FPC, the contractual arrangements, as the Fourth Circuit pointed out (Pamphlet Op., pp. 15-16) deprived Penn Water of the right to initiate proceedings before regulatory bodies with respect to matters affecting its business and the public interest.

On this important matter of the applicability of *Parker* v. *Brown* to the present situation, the D. C. majority (R. Vol. 18, p. 51) and the Fourth Circuit (Pamphlet Op., p. 20) are in direct conflict.

(5) There Is No Question in This Case of a Failure to Exhaust Administrative Remedies or of Any Collateral Attack on FPC Rate Orders. Respondents Consolidated and the Maryland Commission make the unfounded claim that the Petitioners have not exhausted their administrative remedies and that this appeal represents a collateral attack upon FPC rate orders. *It is significant that Government counsel for the FPC make no such claim in their Memorandum to this Court.*

Far from failing to employ their administrative remedies, Petitioners have followed exactly the procedure prescribed by the Federal Power Act, namely, petitions to the Court of Appeals to review the FPC orders and petitions for certiorari to this Court, all after having raised the points involved before the FPC itself and after rejection of such points by the FPC in the orders here sought to be reviewed.*

There is here no collateral attack on an effective FPC rate order, and the authorities cited in the briefs of Consolidated and the Maryland Commission relating to such collateral attacks are simply not in point.

For these reasons we cannot understand the suggestion made by these two Respondents, and also in the D. C.

---

* The FPC, in its brief below in opposition to Petitioners' motions to annul or remand, expressly states (Tr. 5552) that the arguments advanced by Penn Water "are not new, having been urged upon the Commission and considered by it and having been repeatedly urged in this proceeding before this Court." How then can the Maryland Commission in its brief in this Court say (Br., pp. 12-13) that statements in the Petition are "calculated to mislead this Court to believe that such an issue had been raised in the proceeding before the Commission, had been ruled upon by the Commission," or (Br., pp. 22-23) that "this question is simply not presented by the record, was not before the Court below," or (Br., p. 33) that the question of the interrelation of the Sherman Act and the Federal Power Act "had not been presented to the Commission and hence could not have been covered by its Orders"? Consolidated makes the same unfounded statements in its brief in this Court (pp. 6-7).

majority opinion, that Penn Water should be forced to accept the present rate orders, although being properly reviewed under the statute; that in order to make the points made in its petition, Penn Water must file with the FPC new schedules embodying a new arrangement; and that in the new proceeding it must again make the same points already urged in this case. In such new proceeding Respondents would undoubtedly claim that the sustaining of the present orders was a precedent* and the points were being made too late.**

The Maryland Commission's brief in this Court (p. 34) asserts that the granting of certiorari would reopen the rate orders after protracted hearings and cause delay; but the filing of new tariffs and the starting of a new proceeding would obviously cause even greater delay.

(6) The Voluminous Arguments of Respondents as to the Economic Desirability of the Continuance of These Contractual Arrangements are Irrelevant and Unfounded. Counsel for the Respondents in their briefs argue at length regarding the economic desirability of the continuance of the contractual arrangements. It is difficult to see what bearing that can have on the granting or denial of the petition for *certiorari*, but since so much space is devoted to these arguments, we shall deal with them briefly.

The main argument of the Respondents as to the desirability of the continuance of the contractual arrangements seems to be that embodied in the FPC brief below that the arrangement "permits Penn Water's facilities to be

---

* As pointed out in Penn Water's petition (fn., p. 16), the commencement of such a new proceeding could not correct the wrongful orders of the FPC on review herein. As also there pointed out, Penn Water filed new rate schedules on a new basis, but such rate schedules were rejected by the FPC on the ground, among others, that before doing so Penn Water "must recognize" the existing FPC orders with all the adverse implications arising from such recognition.

** Respondent Consolidated claims in its brief in this Court (p. 4) that the questions are not ripe for determination, *i. e.*, that they are made too early.

operated as though they were under common ownership with Baltimore Company's facilities" (Tr. 5574), so that there shall not be set up in the subservient company "an economic interest upon its part" (Brief of FPC before Fourth Circuit, p. 14) and so that the subservient company's interests are not affected by the exercise of the dominant power over it (same Brief, pp. 33-34).

There is no valid reason given why Penn Water should be tied as a captive to any of the utility companies with which it is interconnected; and *a fortiori* no sensible reason why it should be made captive to Consolidated, any more than to one of the three companies with which it is interconnected in the north, Metropolitan Edison Company, Pennsylvani Power & Light Company or Philadelphia Electric Company (see map on back cover of petition). There is nothing in the Federal Power Act which shows the intention of Congress to give the FPC authority to deliver one company over as a captive to another. Nothing to support the Respondents' contention flows from the fact that Consolidated has a larger steam capacity than Penn Water. The other utilities referred to also have larger steam capacity.

Furthermore, there is no shred of claim that Penn Water's interconnections to the north do not provide as good service to customers there under the normal unit rate contracts approved by the same FPC orders, without controls by one company over another, as does Penn Water's interconnection with Consolidated with the illegal revenue pooling, restraints and controls. Nor is there any claim that Penn Water's utility customers to the north are not just as dependent on Penn Water's power as Consolidated.

It is common knowledge that the companies to the north, as in other geographical areas in the country, are interconnected and interchange power and constitute efficient power pools without contractual arrangements of the type here involved.

This argument of the Respondents simply serves to prove in their own words that the revenue arrangement stifles all economic incentive on the part of Penn Water.

It leaves Penn Water with no motivation (a) to sell more power, (b) to obtain more customers, (c) to improve its service, or (d) to effect economies. These have been the negative vicious products of the contractual arrangements.

The affirmative vicious products have been (1) Consolidated's interference with Penn Water's power contracts with other utilities, (2) Consolidated's prevention of any expansion of the generating and transmission facilities of Penn Water when every other utility company including Consolidated was installing needed new facilities, and (3) Consolidated's dictation to Penn Water of purchases of power from Consolidated on Consolidated's terms rather than from other utilities on terms negotiated between Penn Water and them.

As the Fourth Circuit said in its recent decision (Pamphlet Op. p. 15): "These restrictions which tied the parties together and stifled individual initiative for the period of fifty years were made to promote the advantage of the persons in control and not primarily in the interest of the public."

(7) Respondents' argument, that the decision below as to the applicability of Part II to licensees under Part I is not in conflict with the decisions of other circuits, is unsound. It should be pointed out again that the question whether Part II of the Federal Power Act is applicable to a licensee under Part I and in what manner and to what extent, (a) has never been decided by this Court, and (b) is squarely presented by the D. C. majority's holding that Part II impliedly repealed portions of Part I (particularly Section 10(h), which reaffirmed the antitrust laws) and gave the FPC authority to grant exemption from such laws.

If for no other reason than this, if this Court grants certiorari on the questions of the authority of the FPC to exempt contractual arrangements from the antitrust laws and state laws, this Court should also grant certiorari on this question of the relationship between Part I and Part II. In considering the other questions this Court would

not want to be in a position of inability to deal with this point which underlies the reasoning of the D. C. majority.

Moreover, the decision of the D. C. majority is in direct conflict with the decisions of other Circuits on this matter and this Court should grant certiorari for that reason also. Respondents concede that the opinion of the D. C. majority on this point conflicts with opinions of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *F. P. C.*, 137 F. 2d 787, 792, 793 (1943), and of another panel of the D. C. Circuit in *Alabama Power Co.* v. *F. P. C.*, 128 F. 2d 280, 293 (1942), simply arguing that the latter two opinions did not have the question directly involved. However that may be, these conflicting opinions certainly leave the matter in serious doubt until this Court determines it.

In addition to the above conflict, it is clear that the D. C. majority opinion is in direct conflict with the decision of the Third Circuit* and the Fourth Circuit decisions on an important aspect of the question. The Third Circuit held that while Part II was applicable to licensees under Part I, there was no inconsistency between the two parts of the Act and based its decision regarding applicability primarily on that reasoning. The Fourth Circuit, in both the Penn Water and Safe Harbor contract cases, also held that Section 10(h) of Part I, having been reenacted at the same time that Part II was enacted, was not repealed by Part II.** Contrary to both other Circuits, the D. C. majority holds that Part II is inconsistent with, and repeals important provisions of, Part I, particularly Section 10(h). This Court should remove

---

* *Safe Harbor Water Power Corp.* v. *F. P. C.*, 179 F. 2d 179, 185 (1949), cert. den. 339 U. S. 957 (1950).

** The position taken by the Fourth Circuit is the position taken by the government in its brief in this Court in *Isbrandtsen* v. *United States*, October Term, 1951, Nos. 134, 135, to the effect that an administrative body cannot sanction under one section of an act what Congress has flatly forbidden in some other section (Brief on Appeal in that case, pp. 17, 48).

the uncertainty on this important question of the interrelation of the two Parts of the Act in regard to licensees, as well as the question whether Part II is applicable at all.

It is respectfully submitted that the petition should be granted in all respects.

WILLIAM J. GROVE,
Assistant Counsel,
THOMAS M. KERRIGAN,
Assistant Counsel,
LLOYD S. BENJAMIN,
Acting Counsel,
For Pennsylvania Public Utility Commission.
North Office Building,
Harrisburg, Pennsylvania.

WILKIE BUSHBY,
RANDALL J. LEBOEUF, JR.,
JAMES PIPER,
RAYMOND SPARKS,
Attorneys for Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland.

January 26, 1952.